

2012

Litigant Consent: The Missing Link for Permissible Jurisdiction for Final Judgment in Non-Article III Courts after *Stern v. Marshall*

Jillian M. Clouse

American University Washington College of Law

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LITIGANT CONSENT: THE MISSING LINK FOR PERMISSIBLE JURISDICTION FOR FINAL JUDGMENT IN NON- ARTICLE III COURTS AFTER *STERN V.* *MARSHALL*

JILLIAN M. CLOUSE*

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* Senior Note and Comment Editor, Vol. 21, *American University Journal of Gender, Social Policy & the Law*; J.D. Candidate, May 2013, American University, Washington College of Law; B.A. 2006, American University. This comment was an undertaking with many hurdles and more sleepless nights than the author cares to recount. However, all of it would have been nigh on impossible without the help and support of friends and family. Thank you to Lilian Leifert for being not only a tremendously supportive friend for the past 9 years, but also the best not-so-secret editor a writer could ask for; Ashley J. Fausset for making sure the author did occasionally leave the house; Professor Stephen I. Vladeck for perennially offering his time and guidance; and, of course, the author's parents for putting up with her rambling about the permissible jurisdiction of Article III, the Fifth Circuit, and SCOTUS over the past year.

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I. INTRODUCTION

Article III Section 1 of the United States Constitution grants Article III judges life tenure and protection from salary diminution.¹ These constitutional safeguards are intended to free the courts of undue influence from the other branches of government² and diminish separation of powers concerns.³ Nevertheless, these concerns may arise when Congress grants a non-Article III court jurisdiction to issue final judgment in a matter under one of the nine jurisdictional provisions constitutionally reserved for federal courts under Article III.⁴

The Supreme Court has split in its existing jurisprudence concerning separation of powers issues between Article III and non-Article III adjudicatory bodies.⁵ The Court's decisions are divided on whether a

1. See U.S. CONST. art. III, § 1 (promoting life tenure as Article III judges can only be removed for good cause by impeachment).

2. See Ralph Brubaker, *Article III's Bleak House (Part II): The Constitutional Limits of the Bankruptcy Judges' Core Jurisdiction*, BANKR. L. LETTER, Sept. 2011, at 1 (explaining the constitutional reasons that Article III courts are held above other non-Article III federal courts).

3. See THE FEDERALIST NO. 79 (Alexander Hamilton) (explaining the necessity of separation of powers in creating an independent judiciary).

4. See Brubaker, *supra* note 2 (citing U.S. CONST. art. III, § 2 regarding the jurisdiction of Article III courts).

5. Compare *N. Pipeline Const. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 87 (1982) (holding that the formalist requirements of Article III limit the jurisdiction of non-Article III bankruptcy courts), with *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 857 (1986) (implementing a balancing test to determine if a jurisdictional grant violates Article III).

formalist approach or a balancing test is more appropriate to determine whether non-Article III courts have jurisdiction to issue a final judgment.⁶ In *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, the Court applied a formalist approach, which focused on the traditional separation of powers concerns of eroding Article III preeminence.⁷ Alternatively, the balancing approach of *Commodities Federal Trading Commission v. Schor* embodies a more structural approach where efficiency is valued as having more weight than Article III jurisdictional concerns.⁸

The Court recently revisited the issue of non-Article III adjudication in *Stern v. Marshall*.⁹ In a five-four decision, the majority held that a section of the Bankruptcy Amendments and Federal Judgeship Act (BAFJA) grants bankruptcy courts impermissible jurisdiction over state law counterclaims in violation of Article III.¹⁰ Despite the majority's avowal that *Stern's* holding is narrow with a limited impact, the dissent expressed concerns that a formalist approach is too broad and will reduce judicial efficiency and therefore negatively impact the federal court system.¹¹ Such concerns are not unjustified, given that in the few months following *Stern*, courts across the country have struggled to apply the holding consistently.¹²

In a recent case, the Fifth Circuit, *sua sponte*, asked litigants to determine whether the holding in *Stern*, which restricts the jurisdiction of bankruptcy courts, also limits the jurisdiction granted to magistrate judges, who are non-Article III adjudicators who may issue final judgment per 28 U.S.C. § 636(c).¹³ Under § 636(c), magistrate judges are able to enter a

6. See *Schor*, 478 U.S. at 847-49 (citing *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 583 (1985) and *N. Pipeline*, 458 U.S. at 64, to emphasize litigant consent).

7. See *N. Pipeline*, 458 U.S. at 59-61 (noting the risk of relinquishing jurisdiction to non-Article III courts).

8. See *Schor*, 478 U.S. at 849 (implying that structural efficiency overcomes formalist Article III concerns).

9. See *Stern v. Marshall*, 131 S. Ct. 2594, 2608 (2011) (taking a formalist approach to Article III jurisprudence).

10. See Pub. L. No. 98-353, 98 Stat. 333 (1984) (codifying the jurisdiction of bankruptcy courts over state law counterclaims at 28 U.S.C. § 157(b)); *Stern*, 131 S. Ct. at 2608 (holding 28 U.S.C. § 157(b)(2)(C) unconstitutional under Article III).

11. See *Stern*, 131 S. Ct. at 2620 (agreeing with the Solicitor General that the issue is narrow). But see *id.* at 2629-30 (Breyer, J., dissenting) (arguing that the majority's holding will result in bogged down courts).

12. Compare *In re Taylor*, No. 11-1607, 2011 WL 362440, at *4 (3d Cir. 2011) (holding that Article III courts cannot override the jurisdiction of the bankruptcy court on core issues and citing *Stern's* dissent), with *Townsquare Media, Inc. v. Brill*, 652 F.3d 767, 772 (7th Cir. 2011) (holding that the litigant's claim was properly removed from the bankruptcy court under *Stern*).

13. See generally Order of Sept. 9, 2011, *Technical Automation Servs. Corp. v. Liberty Surplus Ins. Corp.*, 673 F.3d 399 (5th Cir. 2012) (No. 10-20640) [hereinafter Order]. As this Comment went to press, the Fifth Circuit issued its opinion in

final judgment with express litigant consent.¹⁴ By asking the parties to address this “substantial” jurisdictional issue, the Fifth Circuit attempts to address whether the formalist holding of *Stern* precludes the waiver of the right to Article III adjudication as set forth in *Schor*.¹⁵

This Comment argues that the requirements of Article III, as put forth in *Stern*, do not prevent a litigant from consenting to a non-Article III court to both hear and issue a final judgment by expressly waiving their constitutional right to Article III adjudication.¹⁶ Part II examines the formalist limitations of non-Article III adjudication as set forth by the Court.¹⁷ Part III argues that constitutionally limiting the jurisdiction of non-Article III tribunals is a formalist concern, rather than a structural one, and that such separation of powers concerns can be remedied through litigant consent and waiver of the right to Article III adjudication.¹⁸ Part IV proposes that courts interpret *Stern* narrowly, only limiting the jurisdiction of bankruptcy courts if the court lacks express litigant consent.¹⁹ Part V of this Comment concludes that the consent of the parties can overcome the constitutional issues of non-Article III adjudication without causing separation of powers concerns.²⁰

Technical Automation Services Corp, 673 F. 3d at 401. Ultimately, the court decided that it was not its place to overturn existing Fifth Circuit precedent as established under *Puryear v. Ede's Ltd.*, 731 F.2d 1153 (5th Cir. 1984). *Puryear* holds that § 636(c) does not run afoul of Article III by allowing magistrate judges to issue final decisions with the express consent of the litigants. However, *Puryear* predates the Supreme Court's decision in *Schor*, and like *Technical Automation*, it lacks relevant analysis in regards to why consent creates permissible non-Article III adjudication. Thus, the analysis of this comment remains relevant.

14. See 28 U.S.C. § 636(c) (2006) (requiring the express consent of the litigants prior to the start of magistrate proceedings).

15. See Order, *supra* note 13, at 1 (stating that the Fifth Circuit has the obligation to raise the issue of *Stern*'s effect on magistrate judges even if it was not raised by the parties); *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 849 (1986) (stating that the right to Article III adjudication is procedural, and therefore can be waived).

16. See *Stern*, 131 S. Ct. at 2620 (stating that even small issues like the one in *Stern* can create Article III constitutional issues).

17. See *infra* Part II (distinguishing between the limits on bankruptcy courts specifically, and other non-Article III forums more generally).

18. See *infra* Part III (arguing that litigants may consent, waiving their right to Article III adjudication, which solves the non-Article III jurisdictional question of adjudication).

19. See *infra* Part IV (establishing that “jurisdictional Ping-Pong” only creates confusion for litigants and drastically reduces the efficiency of the federal court system).

20. See *infra* Part V (concluding that litigant consent may overcome Article III jurisdictional concerns).

II. BACKGROUND

A. Limited Jurisdiction of Non-Article III Courts

The judiciary places limits on non-Article III courts to preserve the boundaries between the different branches of government.²¹ Currently, the federal court system contains several non-Article III adjudicatory bodies including administrative courts, bankruptcy courts, and magistrate judges.²² Non-Article III judges are often specialists in their field of adjudication, though they are not afforded the same job security imparted to Article III judges.²³ Judges sitting in such tribunals do not enjoy the same constitutional protections against undue influence as Article III judges, which creates an underlying tension between Article III courts and their federal non-Article III counterparts.²⁴ Though the Constitution empowers Congress to create inferior federal non-Article III courts, this legislative allocation of judicial authority can create constitutional concerns regarding the separation of powers.²⁵

1. Formalist Analysis of Non-Article III Adjudication.

In *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, the Court held that Congress's jurisdictional grant to the bankruptcy courts was impermissibly broad under Article III of the Constitution.²⁶ Applying a formalist analysis, the majority in *Northern Pipeline* emphasized that there are only three exceptions to the limits Article III places on Congress's

21. See *N. Pipeline v. Marathon Pipe Line Co.*, 458 U.S. 50, 58 (1982) (distinguishing Article III courts as an institutional structure that helps ensure separation of powers).

22. See, e.g., *Commodity Exchange Act*, 7 U.S.C. § 2 (1922) (creating the Commodity Futures Trading Commission as an administrative adjudicatory body); Pub. L. No. 95-598, 92 Stat. 2512 (1978) (creating bankruptcy judgeships); Pub. L. No. 90-578, 82 Stat. 1107 (1979) (establishing magistrate judges as adjuncts of the district court).

23. See U.S. CONST. art. III, § 1 (granting judges life tenure and a protected salary). See generally James E. Pfander, *Article I Tribunals, Article III Courts, and the Judicial Power of the United States*, 118 HARV. L. REV. 643, 646 (2004) (examining the balance between Article III and non-Article III courts).

24. See Brubaker, *supra* note 2 (explaining that the holding of *Stern v. Marshall* narrows the authority of bankruptcy judges); Erwin Chemerinsky, *Ending the Marathon: It Is Time to Overrule Northern Pipeline*, 65 AM. BANKR. L.J. 311, 311 (1991) (criticizing *Northern Pipeline's* limitation on bankruptcy courts).

25. Cf. *Stern v. Marshall*, 131 S. Ct. 2594, 2605 (2011) (explaining that granting jurisdiction to bankruptcy courts to adjudicate all state law counterclaims under 28 U.S.C. § 157(b)(2)(C) causes constitutional concerns).

26. See Pub. L. No. 95-598, 92 Stat. 2549 (1978) (granting bankruptcy courts jurisdiction over state law claims); *N. Pipeline*, 458 U.S. at 60, 68 (citing *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 280-82 (1856) to establish the foundation for the public rights doctrine).

power to grant jurisdiction to non-Article III bodies.²⁷ These exceptions are for territorial courts, military tribunals, and courts adjudicating public rights.²⁸ The Court held that bankruptcy courts did not have the authority to decide state law claims that were only peripherally related to the bankruptcy estate because the newly created bankruptcy judges were not Article III judges.²⁹ The holding of *Northern Pipeline* effectively negated the jurisdiction of the bankruptcy courts granted under BAFJA because the Congressional grant was overbroad and therefore unconstitutional under Article III.³⁰ The Court deferred the judgment, however, to allow Congress time to revise the law to leave bankruptcy courts in place without violating the Constitution.³¹ Congress did so in the 1984 amendments to the bankruptcy code.³²

2. A Balancing Approach to Article III Violations

After *Northern Pipeline*, the Court moved away from a formalist analysis, implementing a balancing test to decide the question of non-Article III jurisdiction and adjudication in *Commodity Futures Trading Commission v. Schor*.³³ Examining the jurisdiction granted to the Commodity Futures Trading Commission ("CFTC") over certain state law counterclaims in the Commodity Exchange Act, the Court relied on several factors to determine Article III violations, including whether the litigant has waived his right to Article III adjudication through explicit consent.³⁴ The Court held that though a procedural right to Article III adjudication exists, it is not an absolute right required in all circumstances.³⁵ Balancing the

27. See *N. Pipeline*, 458 U.S. at 67-70 (distinguishing public rights cases from private rights cases and holding that the jurisdiction conferred on the bankruptcy court is a private right, thus subject to Article III adjudication).

28. See *id.* (emphasizing that bankruptcy courts do not qualify under the Article III exceptions).

29. See *id.* at 73-74 (expressing concern that non-Article III courts will be adjudicating matters never intended by Congress).

30. See Chemerinsky, *supra* note 24, at 311 (emphasizing that *Northern Pipeline* invalidated the jurisdictional grant by Congress to the 1978 bankruptcy court).

31. See *id.* (explaining that the holding of *Northern Pipeline* stripped the bankruptcy court's jurisdiction).

32. See Pub. L. No. 98-353, 98 Stat. 333 (1984) (amending the 1978 bankruptcy act to remedy issues per *Northern Pipeline*); see also Brubaker, *supra* note 2 (explaining that BAFJA attempted to resolve the constitutional deficiency found in *Northern Pipeline* by creating categories of "core" and "non-core" proceedings).

33. See *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 851 (1986) (enumerating the factors of the balancing test); Brubaker, *supra* note 2 (reasoning that the decisions in *Thomas* and *Schor* drastically differ from the public rights approach established in *Northern Pipeline*).

34. See *Schor*, 478 U.S. at 836 (explaining that the Commodities Exchange Act granted the CFTC authority to adjudicate state law counter claims arising under the initial claim).

35. See *id.* at 849 (explaining that Article III adjudication is a constitutional right

various factors, the Court found that the jurisdictional grant to the CFTC over state law counterclaims did not violate Article III.³⁶ To preserve congressional intent of creating judicial efficiency, the majority found that the grant of jurisdiction to an administrative tribunal such as the CFTC was both necessary and not inconsistent with the demands of Article III.³⁷ To reconcile judicial independence with efficiency in the federal court system, the Court held that the right to Article III adjudication can be waived, and that non-Article III adjudication is constitutionally permissible.³⁸ The Court ultimately upheld non-Article III adjudication, despite formalist objections to the jurisdiction granted to the CFTC because of possible infringements on the province of Article III.³⁹

B. The Supreme Court Re-adopts a Formalist Approach in Stern v. Marshall

In its recent decision *Stern v. Marshall*, the Court returned to a formalist approach to resolve whether non-Article III courts have jurisdiction to issue final decisions where Article III or state courts traditionally have jurisdiction.⁴⁰ The holding in *Stern* moves Article III jurisprudence away from the balancing test detailed in *Schor*, returning the focus to the public rights exception emphasized in *Northern Pipeline*.⁴¹ The Court held that Congress's grant of jurisdiction over state law counterclaims to bankruptcy courts under 28 U.S.C. § 157(b)(2)(C) violated Article III of the Constitution.⁴² Applying the formalist analysis of Article III, the Court relied on the holding in *Northern Pipeline* to emphasize the limited exceptions to Article III adjudication.⁴³ Despite the return to formalism in *Stern*, the Court did not foreclose the role of litigant consent as examined

that the litigant can waive).

36. See *id.* at 841-42, 857 (stating that judicial independence is not harmed by non-Article III adjudicatory bodies).

37. See *id.* at 843-44 (discussing the impact of foreclosing the CFTC's jurisdiction as granted by Congress).

38. See *id.* at 849-52 (asserting that judicial efficiency outweighs separation of powers concerns).

39. See *id.* at 851-52 (explaining that a strict formalist view of Article III does not allow for such adjudication).

40. See Brubaker, *supra* note 2 (differentiating between the jurisdictional grant of Article III and non-Article III forums to issue a final decision in state law matters).

41. See *id.* (analyzing the rejection of *Schor*'s balancing test and the return to the formalist approach of *Northern Pipeline*).

42. See 28 U.S.C. § 157(b)(2)(C) (granting jurisdiction over all counterclaims arising from the bankruptcy proceedings); *Stern v. Marshall*, 131 S. Ct. 2594, 2620 (2011) (finding that even this minute intrusion on Article III jurisdiction is an impermissible incursion on the separation of powers).

43. See *Stern*, 131 S. Ct. at 2614, 2621 (listing Article III exceptions for territorial courts, military tribunals, and those courts adjudicating public rights).

by *Schor*.⁴⁴ The majority emphasized that the creditor, Pierce Marshall, was not able to fully consent to the bankruptcy court's adjudication of the debtor's compulsory counterclaim that was brought before the court pursuant to 28 U.S.C. § 157(b)(2)(C).⁴⁵ Though it is not explicitly stated in the holding, the majority implies that if the creditor had been able to consent to the forum, the argument would have been moot.⁴⁶

In 28 U.S.C. § 157(b)(2)(C), Congress granted bankruptcy judges broad jurisdiction over proceedings related to bankruptcy matters even if those matters were not derived from the bankruptcy.⁴⁷ The Court held that this grant of jurisdiction to adjudicate and finally decide non-core counterclaims under state law, even if the counterclaim is compulsory, violated Article III.⁴⁸ Thus, the Court found the Congressional grant of jurisdiction under § 157(b)(2)(C) impermissible because bankruptcy judges are not Article III judges vested with the protections of the Constitution.⁴⁹ The Court stated that the holding in *Stern* should apply narrowly, which does not foreclose the possibility that litigant consent would allow for final adjudication by a non-Article III tribunal going forward.⁵⁰ In contrast, the dissent in *Stern* applied the Court's holding in *Schor*, which focused on the fact that the creditor chose to file proof of claim within the bankruptcy court itself.⁵¹ The dissent argued that by doing so, the creditor, Pierce Marshall, consented to the bankruptcy court's jurisdiction through filing a proof of claim.⁵² Because the litigant affirmatively consented, the dissent reasoned that § 157(b)(2)(C) should be constitutionally permissible and statutorily valid.⁵³ While the majority opinion agreed that § 157(b)(2)(C) is

44. *See id.* at 2606-07 (arguing that the creditor only consented to the bankruptcy court's adjudication of his initial claim, not the subsequent counterclaim).

45. *See id.* (emphasizing that Pierce was not able to truly consent to the bankruptcy court as a forum of adjudication).

46. *See id.* (implying that if the creditor was able to consent to the bankruptcy court's adjudication, there would not be underlying Article III concerns).

47. *See* 28 U.S.C. § 157(b)(2)(C) (granting bankruptcy courts jurisdiction over all counterclaims arising under, but not deriving from, the bankruptcy case).

48. *See Stern*, 131 S. Ct. at 2608 (holding that though the jurisdiction granted in 28 U.S.C. § 157(b)(2)(C) was facially valid, it was not constitutionally permissible).

49. *See id.* at 2620 (explaining that bankruptcy judges are not adjuncts of that court nor do they enjoy the protections of Article III).

50. *See id.* (implying that if Pierce was able to "truly" consent to the bankruptcy court's adjudication there would be less of an Article III concern).

51. *See id.* at 2623 (Breyer, J., dissenting) (arguing that much like *Schor*, *Stern* deals with the adjudication of a state law counterclaim that arose from the proceedings at hand).

52. *See id.* (arguing that filing a claim in a forum indicates implicit consent to that forum's statutorily granted jurisdiction, including the ability to enter final judgment on compulsory counterclaims such as those arising under § 157(b)(2)(C)).

53. *See id.* at 2626-27 (emphasizing the need for judicial efficiency in the bankruptcy system).

facially valid, it disagreed as to whether the creditor had truly consented to the jurisdiction of the bankruptcy court to issue a final judgment, which left the constitutional concern intact.⁵⁴

C. Other Non-Article III Grants of Jurisdiction for Adjudication over Final Judgments

Magistrate judges are non-Article III judges that differ from other non-Article III tribunals in that they act solely as adjuncts of the Article III district court, except when exercising jurisdiction under 28 U.S.C. § 636(c).⁵⁵ As magistrate judges do not usually issue final judgments without the approval of an Article III judge, the jurisdictional power employed by magistrate judges is generally embodied in acting as an adjunct to the district court, despite their status as a non-Article III adjudicator.⁵⁶

However, under § 636(c) of Title 28, Congress granted jurisdiction to magistrate judges to issue final decisions in particular circumstances without the supervision of the district court.⁵⁷ Section 636(c) allows magistrate judges to issue a final judgment outside the supervision of the district court only if the parties expressly consent to the magistrate judge's adjudicatory authority.⁵⁸ This grant of jurisdiction is different from the grant of jurisdiction in § 157(b)(2)(C), in that § 636(c) requires the express consent of the parties.⁵⁹ In *Technical Automation Services Corp. v. Liberty Surplus Insurance Corp.*, the Fifth Circuit raised the issue, *sua sponte*, of whether the jurisdiction granted under § 636(c) is permissible under Article III of the Constitution regardless of whether the parties expressly consent to the jurisdiction of the court under the holding of *Stern*.⁶⁰

54. See *id.* at 2600 (majority opinion) (expressing concern that the counterclaim was already finally decided in a Texas probate court prior to the decision by the bankruptcy court).

55. See 28 U.S.C. § 636(c) (2006) (granting magistrate judges jurisdiction to issue a final judgment independent of the district court with the consent of the parties).

56. But see Pfander, *supra* note 23, at 765 (stating that the expansion of magistrate judges' authority through jurisdictional grants by Congress may infringe on the purview of Article III).

57. See Pub. L. No. 90-578, 82 Stat. 1107 (1968) (allowing magistrate judges to act independently of the district court's oversight).

58. See 28 U.S.C. § 636(c) (stating that final decisions may be issued without the oversight only "upon consent of the parties").

59. See *id.* (requiring the express consent of the parties to proceed independent of Article III supervision).

60. See Order, *supra* note 13, at 1 (questioning whether the holding of *Stern* should be applied more broadly to other non-Article III jurisdictional grants other than § 157(b)(2)(C)).

III. ANALYSIS

The holding in *Stern* is only intended to affect state law counterclaims filed in bankruptcy court that are not critical to the resolution of the bankruptcy estate.⁶¹ Though the overall language of *Stern* addresses broader issues of Article III jurisprudence, it does not call into question the jurisdiction of all non-Article III forums of adjudication.⁶² Rather, the Court structured the holding around the overbroad statutory grant of jurisdiction within § 157(b)(2)(C) to the non-Article III bankruptcy courts because the statute itself threatened to foreclose the litigant's right to Article III adjudication.⁶³ Distinguishing the facts of *Stern* from the facts of *Schor*, the Court chose not to overrule *Schor*, which allows litigants to consent to non-Article III forums by waiving their right to Article III adjudication.⁶⁴

A. *Stern Fails to Explicitly Address the Effect of Litigant Consent on the Jurisdiction of Non-Article III Courts.*

Because the Court holds that parties may waive their right to Article III adjudication, the jurisdictional problem *Stern* creates by relying solely on the formalist requirements of Article III is resolved by analyzing the facts under *Schor*.⁶⁵ *Schor* embodies a pragmatic approach to judicial efficiency, which highlights the ability to consent to waive the right to Article III adjudication.⁶⁶ *Stern*'s holding emphasizes this right by stressing the inability of the creditor to consent to the non-Article III forum of the bankruptcy court.⁶⁷ The Court in *Stern* erred, however, by not applying *Schor* to its analysis, but instead relying on *Northern Pipeline*.⁶⁸ In doing so, *Stern* has created a jurisdictional struggle where some litigants may have no alternate forum to bring their compulsory counterclaims.⁶⁹

61. See *Stern v. Marshall*, 131 S. Ct. 2594, 2615 (2011) (emphasizing the importance of *Stern*'s connection to *Northern Pipeline*, which was specific to the jurisdiction of bankruptcy courts only).

62. See *id.* at 2620 (Scalia, J., concurring) (stating that the opinion will not have a broad, far-reaching effect).

63. See *id.* at 2621 (stressing that the litigant had no other choice of forum for the counterclaim adjudication).

64. See *id.* at 2606 (majority opinion) (distinguishing *Stern* from *Schor* so as to not overrule it).

65. See *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 850 (1982) (stating that Article III rights can be waived, resolving separation of powers concerns).

66. See *Stern*, 131 S. Ct. at 2607 (citing § 157(c)(2) to emphasize that litigants may consent to the bankruptcy court as a forum).

67. See *Schor*, 478 U.S. at 849 (emphasizing that the right to Article III adjudication may be waived like all procedural constitutional rights).

68. But see *Stern*, 131 S. Ct. at 2615 (distinguishing between the jurisdiction granted to the CFTC in *Schor* and the jurisdiction granted under § 157(b)(2)(C)).

69. See *id.* at 2629-30 (Breyer, J., dissenting) (stressing the implications of the

1. Applying Schor's Balancing Test, the Court in Stern Would Have Found the Jurisdictional Grant Under § 157(b)(2)(C) Permissible.

Under *Schor's* balancing test, the Court would not have found Congress's jurisdictional grant in 28 U.S.C. § 157(b)(2)(C) to be impermissibly broad under the Constitution. When applying the factors of *Schor* to the facts of *Stern*, it becomes evident that the jurisdictional grant imparted by § 157(b)(2)(C), though broad, does not create separation of powers concerns in violation of Article III.⁷⁰ The purpose of *Schor's* balancing test is to weigh the constitutional right to Article III adjudication against the purpose and function of the non-Article III forum.⁷¹ By choosing specific factors to balance against each other, the Court can then determine whether a separation of powers concern exists between the judicial and legislative branches through the jurisdictional grant.⁷²

a. Under Factor One of the Schor Balancing Test, the Court in Stern Would Have Found the Jurisdictional Grant of § 157(b)(2)(C) Impermissible.

A final adjudication of a non-core counterclaim under § 157(b)(2)(C) by a bankruptcy judge would be impermissible under the first factor of *Schor*. The first factor of the *Schor* test examines the essential attributes that distinguish Article III courts from other courts.⁷³ The essential attributes of Article III create a barrier against possible political influence and confer a sense of judicial impartiality because of the protections granted to Article III judges.⁷⁴ Bankruptcy judges, on the other hand, are Article I judges, selected and confirmed by the district court.⁷⁵ As such, bankruptcy judges do not enjoy the protections of Article III.⁷⁶ Because § 157(b)(2)(C) grants bankruptcy courts jurisdiction over non-core counterclaims arising under

majority's holding on bankruptcy cases).

70. See *id.* at 2624 (relying on the "clear majority" of *Schor* to support the jurisdiction granted under § 157(b)(2)(C)); *Schor*, 478 U.S. at 850 (listing the balancing test factors: the essential elements of Article III, infringement on Article III, origins and importance of the adjudication right, Congress's intent, and litigant consent).

71. See *Schor*, 478 U.S. at 850 (emphasizing the purpose behind Article III limitations on non-Article III adjudicatory forums).

72. See *id.* at 851 (stating the various measures by which the balancing test is structured for Article III).

73. See *id.* (highlighting the formalist requirements of the text of Article III).

74. See U.S. CONST. art. III, § 1 (granting Article III judges life tenure and protection against salary diminution).

75. See 28 U.S.C. § 152 (2006) (codifying the selection and confirmation process of bankruptcy judges).

76. Compare U.S. CONST. art. III, § 1 (establishing the privileges of Article III judges), with 28 U.S.C. § 152 (establishing bankruptcy judgeships under Article I rather than Article III).

state law, there is greater potential for a final judgment to lack the essential impartiality of Article III adjudication.⁷⁷ The right to have a cause of action adjudicated by an Article III judge arises from the concept of a right to an impartial forum.⁷⁸ Therefore, the jurisdictional grant under § 157(b)(2)(C) would be impermissible under the first factor of *Schor* because it grants a non-Article III adjudicator the authority to issue a final judgment over counterclaims, even if they are unrelated to the core matters of the bankruptcy case.

b. Under Factors Two and Three of the Schor Balancing Test, the Court in Stern Would Have Found the Jurisdictional Grant of § 157(b)(2)(C) Permissible.

Not all counterclaims brought under § 157(b)(2)(C) definitively infringe on the traditional jurisdiction of Article III; such counterclaims would be permissible under the *Schor* balancing test, though it is not dispositive.⁷⁹ The second factor under *Schor* considers whether Congress's grant of jurisdiction to non-Article III courts encroaches on powers historically reserved for Article III courts.⁸⁰ Because these jurisdictional areas are reserved for Article III adjudication under the Constitution, when Congress reallocates a jurisdictional grant it can create a separation of powers issue.⁸¹ In § 157(b)(2)(c), Congress granted jurisdiction over non-core counterclaims, even those arising under state law, to bankruptcy courts.⁸² Because Congress used extremely broad language when it granted bankruptcy court jurisdiction under § 157(b)(2)(C), it is possible the grant infringes upon the province of Article III's jurisdictional claim.⁸³ Much like the claims in both *Northern Pipeline* and *Stern*, the counterclaim at issue in *Schor* was a state law claim.⁸⁴ However, since non-core

77. See *Schor*, 478 U.S. at 848 (indicating that non-Article III adjudications can threaten the balance of powers by reducing the impartial and independent nature of the judiciary).

78. See *id.* at 848 (stating that Article III adjudication safeguards the impartiality of the judiciary).

79. See *id.* at 851 (emphasizing that each factor alone, including consent, cannot be dispositive).

80. See *id.* at 850 (listing the second factor of *Schor*'s test).

81. See U.S. CONST. art. III, § 2 (naming the nine areas over which Article III courts have explicit jurisdiction).

82. See 28 U.S.C. § 157(b)(2)(C) (granting jurisdiction over any counterclaim brought on behalf of the bankruptcy estate).

83. Compare U.S. CONST. art. III, § 2 (noting the various grants of jurisdiction over state law issues), with 28 U.S.C. § 157(b)(2)(C) (granting jurisdiction over any counterclaim, regardless of origin, brought by the debtor).

84. Compare *Schor*, 478 U.S. at 853 (explaining the state law nature of *Schor*'s counterclaim), with *N. Pipeline Const. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 84 (1982) (emphasizing that the bankruptcy court's jurisdiction over state law claims is overbroad), and *Stern v. Marshall*, 131 S. Ct. 2594, 2615 (2011) (explaining that

counterclaims may arise under state law amongst non-diverse parties, it is not definite that all counterclaims brought under § 157(b)(2)(C) would always be under the traditional jurisdictional purview of Article III.⁸⁵ Therefore, it is not dispositive that the jurisdiction granted to the bankruptcy courts under § 157(b)(2)(C) encroaches upon traditional Article III jurisdiction.⁸⁶ Because the finding is not dispositive under the second factor of *Schor*, the grant of jurisdiction under § 157(b)(2)(C) is permissible under Article III.⁸⁷

Because it is not definite that all counterclaims brought under § 157(b)(2)(C) would not fall under one of the exceptions to Article III adjudication, the third factor in the *Schor* test would be permissible under Article III, though it is also not dispositive. The third factor of *Schor* examines the origins and importance of the right to be adjudicated by an Article III court, namely whether the right in question falls under one of the three primary exceptions of Article III adjudication.⁸⁸ The Court has carved out distinct exceptions to Article III adjudication to address where the litigant is not entitled to an Article III judicial review.⁸⁹ The option of Article III adjudication is required for the counterclaims at issue in § 157(b)(2)(C) because they do not fall under the stated exceptions to Article III adjudication.⁹⁰ Nevertheless, since the counterclaims present under § 157(b)(2)(C) may arise from state or federal law, it is not dispositive that such a counterclaim would not be a public right.⁹¹ As the counterclaims brought under § 157(b)(2)(C) are not one particular type of claim, they may qualify under the public rights exception; however, to date, causes of action brought under bankruptcy have not been considered a public right.⁹² The grant of jurisdiction under the third factor of *Schor* is

because the nature of the counterclaim arose under state law, an Article III issue was raised).

85. See 28 U.S.C. § 157(b)(2)(C) (emphasizing that any origin of a counterclaim might not necessarily be state law).

86. But see *Schor*, 478 U.S. at 852 (explaining that jurisdiction granted to the CFTC did not encroach on the traditional jurisdiction of Article III courts).

87. See *id.* at 851 (reaffirming that the factors of the balancing test are not dispositive).

88. See *id.* (naming the factors of the balancing test used in the analysis to determine whether jurisdiction is permissible under Article III of the Constitution).

89. See *N. Pipeline*, 458 U.S. at 65-67 (enumerating the exceptions to Article III adjudication including territorial courts, military tribunals for courts martial, administrative courts and the adjudication of public rights cases).

90. See *id.* at 67 (emphasizing that the jurisdiction granted to bankruptcy courts does not fall into any of the three stated exceptions to Article III adjudication).

91. See *id.* at 68 (explaining where public rights arise from (citing *Murray's Lessee v. Hoboken Land & Imp. Co.*, 59 U.S. (18 How.) 272, 284 (1855))).

92. See *Stern v. Marshall*, 131 S. Ct. 2594, 2621 (2011) (Scalia, J., concurring) (noting that bankruptcy does not fall within any of the exceptions to Article III, including public rights).

permissible under Article III because it is not dispositive that all counterclaims filed under § 157(b)(2)(C) in a bankruptcy court would never fall under any of the stated exceptions to Article III adjudication.⁹³

c. Under the Fourth and Fifth Factors of the Schor Balancing Test, the Court in Stern Would Find the Jurisdictional Grant of § 157(b)(2)(C) Permissible.

Because counterclaims brought under § 157(b)(2)(C) precipitate from a cause of action filed by the creditor in the bankruptcy court, the grant of jurisdiction under § 157(b)(2)(C) does not foreclose an Article III forum, and is therefore, permissible under the fourth factor of the *Schor* test. The fourth factor under *Schor* considers why Congress departed from Article III adjudication and chose instead to bestow jurisdiction on a peripheral adjudicatory body.⁹⁴ In *Schor*, the Court emphasized that Congress's primary goal in granting the CFTC jurisdiction to adjudicate counterclaims was efficiency, and not to circumvent barriers put in place to ensure separation of powers.⁹⁵ Similarly, Congress's grant of jurisdiction to bankruptcy courts under § 157(b)(2)(C) is not intended as a way to circumvent the district court; thus, the district court was intended to remain a viable forum.⁹⁶ Rather, because compulsory counterclaims must be filed in a timely manner or be lost to the litigant, § 157(b)(2)(C) serves as a way to grant jurisdiction over counterclaims that would naturally arise over the course of complex bankruptcy litigation, as was the case in *Stern*.⁹⁷ Therefore, under the fourth factor of *Schor*, the grant of jurisdiction in § 157(b)(2)(C) would be permissible because it did not circumvent alternate forums for the litigants, but rather allowed the litigants to streamline litigation in an efficient manner.⁹⁸

The fifth and arguably most significant factor that *Schor* weighs is whether the parties involved in the litigation consented to the non-Article III forum.⁹⁹ Article III specifies nine jurisdictional grants that are unique to

93. See *id.* at 2612 (majority opinion) (highlighting the factors from which public rights are derived).

94. See *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 851 (1982) (listing the fourth factor of *Schor*'s balancing test).

95. See *id.* at 842 (explaining Congress's intent in promoting efficiency through the creation of the CFTC).

96. See *Stern*, 131 S. Ct. at 2629 (Breyer, J., dissenting) (comparing Congress's grant of jurisdiction under § 157(b)(2)(C) to the grant in *Schor*).

97. See *id.* at 2626 (emphasizing that the litigant loses the chance to raise a counterclaim if not brought forward under Fed. R. Civ. P. 13(a) and Fed. R. Bankr. P. 7013).

98. See *Schor*, 478 U.S. at 834 (emphasizing that efficient adjudication is allowed without raising Article III concerns).

99. See *id.* at 838-39 (explaining that Congressional grants of jurisdiction may not

federal courts.¹⁰⁰ These jurisdictional mandates create a procedural right to Article III adjudication.¹⁰¹ However, even though the litigant has the procedural right to Article III adjudication, he may choose to waive this right, even when it originates under the Constitution.¹⁰² Further, under *Schor*, a waiver to Article III adjudication may be either implied or express.¹⁰³ Because § 157(b)(2)(C) gives bankruptcy courts jurisdiction for any counterclaim filed by the debtor, it is questionable whether the creditor has consented to the jurisdiction of the bankruptcy court as to the counterclaim.¹⁰⁴ Under *Schor*, however, because a creditor would be aware of the extent of the jurisdiction granted to the bankruptcy court under § 157(b)(2)(C) when he filed his claim, he implicitly consented to the rules and structure of that forum.¹⁰⁵ Therefore, even if the debtor brings forward a counterclaim, because the creditor has chosen to litigate his proof of claim in the bankruptcy court, he has implicitly consented to the adjudication of a non-Article III forum under the fifth factor of *Schor*.¹⁰⁶

After examining the bankruptcy courts' grant of jurisdiction under § 157(b)(2)(C) and all of the *Schor* factors, it is clear that while it fails factor one, the jurisdictional grant under § 157(b)(2)(C) is permissible under factors two, three, four, and five.¹⁰⁷ Therefore, had the Court appropriately applied the *Schor* factors to the *Stern* facts, the Court would have held that the bankruptcy court's jurisdictional grant under § 157(b)(2)(C) was permissible because it does not create a separation of powers violation under Article III of the Constitution.¹⁰⁸

exceed Article III without the consent of the litigants (citing *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 584 (1985))).

100. See U.S. CONST. art. III, § 2 (listing the areas of Article III jurisdiction that are reserved for Article III adjudication).

101. See *Schor*, 478 U.S. at 848-49 (stating that the ability to waive the right to Article III adjudication is connected to its nature as a personal, procedural right).

102. See *id.* at 849 (noting that procedural rights may be waived even if disseminated from the Constitution).

103. See *id.* (explaining that waiver of the right to Article III adjudication on the part of *Schor* could have been either express or implied).

104. See *Stern v. Marshall*, 131 S. Ct. 2594, 2606 (2011) (emphasizing that the creditor could not truly consent to the bankruptcy court's adjudication).

105. See *Schor*, 478 U.S. at 850 (stating that *Schor* waived his right to Article III adjudication by litigating in the CFTC).

106. See *id.* at 849 (stating that *Schor*'s waiver of his right to proceed in an Article III court was derived implicitly by his proceeding in the CFTC).

107. See *id.* at 851 (reviewing each of the five factors of the balancing test set forth in *Schor*'s analysis).

108. See *Stern*, 131 S. Ct. at 2625 (Breyer, J., dissenting) (explaining the virtue of balancing factors as espoused in the holding of *Schor*).

2. Had the Court Applied the Balancing Factors of Schor in Addition to the Formalist Analysis of Northern Pipeline in Stern, It Would Have Found the Jurisdictional Grant in § 157(b)(2)(C) Impermissible Under Article III, While Directly Addressing Litigant Consent and Retaining the Formalist Structure of Article III.

Applying the *Schor* balancing test in conjunction with the formalist requirements of *Northern Pipeline*, the Court in *Stern* would have found the grant of jurisdiction under § 157(b)(2)(C) to be constitutionally impermissible. However, the analysis under both *Schor* and *Northern Pipeline* demonstrates that the jurisdictional grant is overbroad because the litigant did not expressly consent to the jurisdiction of the bankruptcy court, not because of a separation of powers concern.¹⁰⁹ While the formalist approach of *Northern Pipeline* appears to be at odds with the *Schor* balancing test, the formalist considerations of *Northern Pipeline* comprise aspects of the *Schor* factors.¹¹⁰ As such, *Schor* does not overrule *Northern Pipeline*, but rather builds off its foundation.¹¹¹ Thus, when § 157(b)(2)(C) is analyzed using the formalist requirements of Article III as put forward in *Northern Pipeline* alongside the consent standard from *Schor*, it becomes evident that the concern in *Stern* is not the broad jurisdiction granted to the bankruptcy courts, but rather the infringement on the litigant's right to Article III adjudication.¹¹²

Because Article III adjudication is a procedural right that can be waived, a litigant who consents to non-Article III adjudication avoids a separation of powers concern under the Constitutional auspices of Article III.¹¹³ The Court in *Schor* establishes that a litigant may consent to non-Article III adjudication.¹¹⁴ To waive the right to Article III adjudication, the litigant must first have chosen the forum.¹¹⁵ Second, the litigant must have by his

109. See *Schor*, 478 U.S. at 849 (holding that consent of the litigant can either be express or implied). But see *Stern*, 131 S. Ct. at 2607 (explaining that the creditor could not consent to the jurisdiction of the bankruptcy court).

110. Compare *N. Pipeline Const. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 59-60 (1982) (enumerating the formalist requirements of Article III), with *Schor*, 478 U.S. at 851 (stating that the Court is disinclined to adopt a formalist approach to Article III).

111. See *Schor*, 478 U.S. at 851 (explaining the "essential attributes" of Article III courts, which are derived from the formalist analysis of Article III).

112. See *Stern*, 131 S. Ct. at 2607 (emphasizing the inability for Pierce, the creditor, to consent to the bankruptcy court as a forum for adjudication or properly remove to district court).

113. See *id.* at 2620 (determining the litigant had not waived his right to Article III adjudication).

114. But see *Schor*, 478 U.S. at 866 (Brennan, J., dissenting) (explaining that the majority erroneously relies on consent to distinguish separation of powers concerns).

115. See *id.* at 849 (majority opinion) (emphasizing litigant choice of forum as a determinative factor).

own action waived his right to Article III adjudication.¹¹⁶ And, third, the court must have jurisdiction over the issue.¹¹⁷

Under *Schor*'s first factor in determining litigant consent, the Court in *Stern* would have found that the creditor in *Stern* did not choose the bankruptcy court himself as the forum for adjudication of the counterclaim.¹¹⁸ In *Northern Pipeline*, the jurisdiction granted to the bankruptcy courts under the 1978 Act was found to have been overbroad because it did not allow an alternate Article III forum for the litigants.¹¹⁹ Much like *Northern Pipeline*, *Stern* does not offer litigants the opportunity to either waive the right to Article III adjudication under § 157(b)(2)(C) or remove to an Article III court.¹²⁰ However, under *Schor*, the parties must consent to waive Article III adjudication in the first instance, meaning that there must exist a real choice between an Article III court, state court, or federal non-Article III adjudicatory forum.¹²¹ Both parties must consent to the choice of forum as each party has an independent procedural right to Article III adjudication.¹²² In *Stern*, it is evident that the creditor did not consent to the bankruptcy court's jurisdiction over the counterclaim because he did not choose the forum himself.¹²³ Rather, the debtor controlled the choice of forum when she filed the compulsory counterclaim in the bankruptcy court.¹²⁴

Second, the litigant must have waived his right to Article III adjudication.¹²⁵ Because the creditor did not truly consent to the

116. See *id.* (emphasizing that *Schor* himself had chosen the forum of the CTFC knowing that it would adjudicate any related counterclaims).

117. See *Stern*, 131 S. Ct. at 2620 (finding that because the final adjudication of the bankruptcy claim did not rest on the resolution of this counterclaim, the issue would not have been under the jurisdiction of the court barring the consent of the litigants).

118. Compare *Schor*, 478 U.S. at 849 (highlighting that the choice of forum was the litigant's prerogative in the first instance), with *Stern*, 131 S. Ct. at 2607 (driving home that the litigant was not able to choose an alternate forum to litigate the debtor's counterclaim).

119. See *N. Pipeline Const. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 84 (1982) (emphasizing that the bankruptcy court's jurisdiction over state law claims is overbroad, limiting litigant's choice of forum).

120. See *Stern*, 131 S. Ct. at 2606 (emphasizing the creditor's lack of legitimate consent which could allow a non-Article III adjudication of the counterclaim within the constitutional bounds of Article III).

121. See *Schor*, 478 U.S. at 849 (explaining that the choice of forum is implicit in whether a non-Article III adjudication causes constitutional concerns).

122. See *id.* at 848-49 (pointing out the nature of Article III adjudication as a personal right governing procedure, held by each individual litigant).

123. See *Stern*, 131 S. Ct. at 2620 (emphasizing that the only forum available to the creditor was the bankruptcy court).

124. See *id.* at 2607 (arguing that the choice of forum for the compulsory counterclaim was out of the creditor's hands, and thus he could not consent to it).

125. See *Schor*, 478 U.S. at 849 (implying that the waiver of Article III adjudication, either express or implied, constitutes litigant consent to non-Article III jurisdiction).

jurisdiction of the bankruptcy court, he did not affirmatively waive his constitutional right to Article III adjudication.¹²⁶ The creditor consented to the jurisdiction of the bankruptcy court by filing a proof of claim to decide that single claim.¹²⁷ Unlike the proof of claim, which is a cause of action brought by the creditor, the counterclaim has no alternative forum available in which the creditor could litigate.¹²⁸ The creditor in *Stern* did not waive his right to Article III adjudication in regards to the counterclaim filed by the debtor.¹²⁹ Under § 157(b)(2)(C), removal of the counterclaim from the bankruptcy court to the district court was not possible.¹³⁰ Rather, as a creditor, Pierce Marshall had no choice but to allow the bankruptcy court to adjudicate the counterclaim, thus his mere presence cannot be deemed as consent.¹³¹ Additionally, the counterclaim filed pursuant to § 157(b)(2)(C) would have also infringed upon the purview of Article III because the creditor under § 157(b)(2)(C) has no mechanism by which to withdraw the referral to the bankruptcy court and remove the matter to the district court, thus preserving his right to Article III adjudication.¹³²

Finally, the court must have jurisdiction over the cause of action for a litigant to meaningfully consent to waive his or her right to Article III adjudication.¹³³ Though the bankruptcy court had statutory jurisdiction over the counterclaim filed by the debtor through § 157(b)(2)(C), applying the formalist requirements of *Northern Pipeline* to *Stern* shows that the jurisdictional grant under § 157(b)(2)(C) is unconstitutionally overbroad.¹³⁴

126. Compare *Stern*, 131 S. Ct. at 2620 (stating the forum could not be consented to because he had no choice where the issue was litigated), with *Schor*, 478 U.S. at 849 (highlighting that forum choice can result in implicitly waiving Article III adjudicatory rights).

127. See *Stern*, 131 S. Ct. at 2607 (noting the creditor only consented to final judgment over his original proof of claim).

128. See *id.* (explaining that the broad grant of jurisdiction under § 157(b)(2)(C) limited the creditor to the forum of the bankruptcy court, infringing on his Article III rights).

129. See *id.* at 2620 (underscoring that the creditor could not consent to the bankruptcy court's jurisdiction over the counterclaim, and thus did not waive his Article III right).

130. See 28 U.S.C. § 157(b)(2)(C) (granting broad jurisdiction to issue final judgment to the bankruptcy court).

131. *Contra id.* (failing to offer provision for removal to the district court for counterclaims as independent causes of action).

132. See *N. Pipeline Const. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 84 (1982) (stating that Congress granted overbroad jurisdiction, which the parties could neither consent to nor remove from).

133. See *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 851 (1986) (listing the various factors that create the balancing test determining the constitutionality of non-Article III jurisdictional grants).

134. Compare *Stern*, 131 S. Ct. at 2608 (stating that the jurisdiction granted under § 157(b)(2)(C) is statutorily permitted, if not constitutionally), with *id.* at 2620 (stating that the overbroad grant of jurisdiction under § 157(b)(2)(C) violates the formal requirements of Article III).

Because § 157(b)(2)(C) grants bankruptcy courts jurisdiction over an area of jurisprudence normally reserved for Article III or state courts without allowing the litigant opportunity to seek out another forum, it creates a separation of powers issue under Article III.¹³⁵ Thus, the litigant would be unable to appropriately waive the right to Article III adjudication.¹³⁶

B. Because § 636(c) Requires the Parties' Express Consent, the Jurisdictional Grant to Magistrate Judges Does Not Violate Article III of the Constitution Due to the Express Consent Requirement.

Section 636(c) of the Federal Magistrates Act allows a magistrate judge to act independently of the district court by presiding at trial and entering final judgment.¹³⁷ In *Technical Automation Services Corp. v. Liberty Surplus Insurance Corp.*, the Fifth Circuit asked litigants to examine whether, under *Stern*, the congressional grant of jurisdiction to magistrate judges in § 636(c) is an overbroad grant of jurisdiction, and therefore unconstitutional.¹³⁸ Similar to § 157(b)(2)(C), which grants jurisdiction to bankruptcy judges to adjudicate state law claims, § 636(c) grants magistrate judges authority independent of the district court.¹³⁹ However, while § 157(b)(2)(C) does not require the consent of the parties, § 636(c) requires explicit consent by the litigants.¹⁴⁰ The jurisdictional issue examined in *Stern* does not apply to magistrate judges because of the statutory language in § 636(c) requiring the consent of the parties.¹⁴¹ Because *Stern* did not overturn *Schor*, the Fifth Circuit should have applied *Schor* to analyze the jurisdictional grant under § 636(c).¹⁴² Further, the *Schor* balancing test captures the formalist requirements of Article III as well as litigant consent which reflects the statutory language of § 636(c), only allowing magistrate

135. Compare *N. Pipeline*, 458 U.S. at 78 (holding that the overbroad grant of jurisdiction under 28 U.S.C. § 1471 (1979) violates the formal Article III), with *Stern*, 131 S. Ct. at 2608 (holding that § 157(b)(2)(C) is impermissible under Article III because the jurisdictional grant is overbroad).

136. See *Stern*, 131 S. Ct. at 2607 (emphasizing that the litigant is unable to consent to non-Article III jurisdiction).

137. See Pub. L. 90-578, 82 Stat. 1107 (1968) (establishing magistrate judges as adjuncts of the district court).

138. See Order, *supra* note 13, at 1 (asking whether the jurisdiction granted under § 636(c) should be considered in light of *Stern*, implying that it may be impermissible under Article III).

139. See 28 U.S.C. § 157(b)(2)(C) (granting jurisdiction to finally decide state law counterclaims); 28 U.S.C. § 636(c) (allowing magistrate judges to act independently of the district court).

140. See *Stern*, 131 S. Ct. at 2608 (explaining that the jurisdictional grant of § 157(b)(2)(c) violates Article III because it is constitutionally overbroad).

141. See *id.* at 2620 (recalling that the holding is intended to be exceptionally narrow).

142. See *id.* at 2613-14 (distinguishing *Stern* from *Schor* to emphasize the difference in the modes of consent for the two cases).

judges to proceed upon the consent of the parties.¹⁴³

1. If the Fifth Circuit Had Applied the Analysis of Stern, It Would Have Incorrectly Found the Jurisdictional Grant of § 636(c) Impermissible.

Under *Stern*, the Fifth Circuit would incorrectly hold that § 636(c) is an overbroad jurisdictional grant under the formalist requirements of Article III as magistrate judges are not Article III judges and because it does not fall under the exceptions to Article III adjudication.¹⁴⁴ To discern whether the grant of jurisdiction to magistrate judges under § 636(c) creates a separation of powers concern under *Stern*, the court would first examine the formalist requirements of Article III.¹⁴⁵ Magistrate judges do not enjoy either life tenure or salary protection of Article III, and therefore lack the essential elements of Article III courts as enumerated in the Constitution.¹⁴⁶ Further, the district court must approve the decisions made by the magistrate judge; therefore, the issued judgments do not infringe upon the concept of an independent judiciary, which Article III intends to preserve.¹⁴⁷ The single exception to this symbiotic relationship is § 636(c), which authorizes magistrate judges to issue a final decision independently of a district court's supervision.¹⁴⁸

While § 636(c) grants magistrate judges the jurisdictional authority to issue a final decision independent of the district court's supervision, § 636(c) requires the parties to expressly waive their right to Article III adjudication before initiating proceedings.¹⁴⁹ Because there is a clear choice of forum and the party expressly waived his right to Article III adjudication when he consented to have a magistrate judge preside over the matter, § 636(c) does not infringe on the auspices of Article III.¹⁵⁰

143. Compare 28 U.S.C. § 636(c)(1) (laying out the consent requirement for magistrate judges to proceed independently), with *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 850 (1986) (listing the "essential elements" of Article III as factors of the *Schor* test).

144. See *Stern*, 131 S. Ct. at 2608 (listing the formal requirements of Article III such as salary protection and life tenure).

145. See U.S. CONST. art. III, § 1, cl. 2 (granting the judiciary independence by awarding life tenure and salary protection).

146. See 28 U.S.C. § 631 (2006) (codifying the appointment and tenure of magistrate judges as adjuncts of the district court).

147. Compare Pub. L. No. 90-578, 82 Stat. 1107 (1968) (creating magistrate judges as adjuncts of the district court), with *Schor*, 478 U.S. at 860 (confirming that Article III is intended to preserve an independent judiciary).

148. See 28 U.S.C. § 636(c)(1) (authorizing magistrate judges to act without the oversight of the district court).

149. See *id.* (requiring the explicit consent of the parties to proceed independent of the district court).

150. See *Stern v. Marshall*, 131 S. Ct. 2594, 2620 (2011) (Scalia, J., concurring) (implying that if Pierce was able to "truly" consent to the bankruptcy court's adjudication there would be less of an Article III concern).

Nevertheless, because the Court in *Stern* did not expressly allow the waiver of Article III rights to cure the infringement on the right to Article III adjudication, under *Stern*, § 636(c) would be impermissible as an overbroad grant of jurisdiction to a non-Article III forum.¹⁵¹

2. Under the Schor Balancing Test, the Fifth Circuit Would Have Found the Jurisdictional Grant of § 636(c) Permissible.

Under *Schor*, each of the balancing factors enumerated would have to be examined in order to determine whether the grant of jurisdiction to magistrate judges is permissible under Article III of the Constitution.¹⁵² The first factor of *Schor* examines the essential elements that distinguish Article III courts from other courts.¹⁵³ Because § 636(c) grants magistrate judges authority to exercise their discretion independently of the district court, even though they do not have salary protection or life tenure, it implicates separation of powers concerns.¹⁵⁴ Section 636(c) clearly calls into question the essential elements of Article III, which are intended to preserve independence of the judiciary, and would therefore be impermissible under the first factor of *Schor*.

The second factor of *Schor* examines whether Congress's grant of jurisdiction intrudes on the traditional jurisdiction of Article III courts.¹⁵⁵ Much like the CFTC in *Schor*, a magistrate judge merely presides over an alternate forum, which is able to adjudicate a party's legal action.¹⁵⁶ However, because the jurisdictional grant to magistrate judges under § 636(c) overlaps directly with the district court, it is presumed this jurisdiction infringes on traditional auspices of Article III.¹⁵⁷ But because § 636(c) requires the consent of the parties before proceeding, it does not displace the Article III courts and would be permissible under the second prong of *Schor*.¹⁵⁸

151. See *id.* at 2607, 2620 (holding that the jurisdictional grant under § 157(b)(2)(C) is impermissible under Article III because bankruptcy judges are not Article III judges).

152. See *Schor*, 478 U.S. at 851 (noting that no one factor of the balancing test weighs more than another).

153. See *id.* (listing the formalist requirements of the text of Article III that create its "essential elements").

154. See Pub. L. No. 90-578, 82 Stat. 1107 (1968) (establishing magistrate judges as adjuncts of the district court).

155. See *Schor*, 478 U.S. at 851-52 (explaining that the CFTC's jurisdiction is not an intrusion on Article III).

156. See *id.* at 852-53, 855 (maintaining that there was more than one forum available for *Schor* to litigate in and that he was not limited to the CFTC).

157. See *Stern v. Marshall*, 131 S. Ct. 2594, 2609-10 (2011) (promoting the formalist requirements of Article III to maintain separation of powers amongst the branches of government).

158. See 28 U.S.C. § 636(c)(1) (2009) (requiring the consent of the litigants to proceed independently of the district court).

The third factor in *Schor* analyzes the origins and importance of jurisdiction being granted to non-Article III courts.¹⁵⁹ The purpose of § 636(c) is to increase judicial efficiency via an alternate forum at the discretion of the parties.¹⁶⁰ Again, because the forum does not supplant the district court but merely augments it, as with the CFTC in *Schor*, the jurisdictional grant should not be deemed overbroad.¹⁶¹

The fourth factor in *Schor* weighs Congress's motivations in departing from Article III adjudication.¹⁶² Similar to the third factor in *Schor*, the motivation behind the grant of jurisdiction to act independently under § 636(c) is to promote judicial efficiency.¹⁶³ As such, the adjudication of a magistrate judge as opposed to a district court judge may be both more expedient and efficient for the parties.¹⁶⁴ Efficiency alone, however, may not suffice to prevent § 636(c) from being overbroad under Article III.¹⁶⁵

The fifth, and final, factor of *Schor* examines whether the litigant waived the right to Article III adjudication through consent.¹⁶⁶ The jurisdiction granted to magistrate judges under § 636(c) is permissible under Article III because it requires litigant consent in the first instance.¹⁶⁷ The essential function of § 636(c) is to provide a procedure through which a party may waive their right to Article III adjudication.¹⁶⁸ Because § 636(c) requires each party to expressly waive the right to Article III adjudication before magistrate judges may preside over a case, the jurisdiction granted under § 636(c) to issue final judgment is not constitutionally overbroad.¹⁶⁹

159. See *Schor*, 478 U.S. at 851 (listing the third factor of the *Schor* test as the significance of the jurisdictional grant).

160. See generally Pub. L. No. 90-578, 82 Stat. 1107 (1968) (creating magistrate judges as adjuncts of the district court).

161. See *Schor*, 478 U.S. at 852-53 (explaining that because the CFTC's jurisdiction is specific, it is therefore not overbroad in terms of the constitutional requirements of Article III).

162. See *id.* at 851 (naming the fourth factor as Congress's justification for departing from traditional Article III adjudication).

163. See generally Pub. L. No. 90-578, 82 Stat. 1107 (1968) (promoting magistrate judges as aids to district court judges in an attempt to streamline caseloads).

164. See *Schor*, 478 U.S. at 842 (explaining the purpose behind the creation of the CFTC to improve and facilitate adjudication, which mirrors the intent of § 636(c)).

165. See *id.* at 857 (noting that no one factor can be individually determinative as to whether the scope of jurisdiction undermines Article III).

166. See *id.* at 848-49 (positing that while consent is not dispositive in determining whether Article III has been violated, it is a factor that must be considered).

167. See *id.* at 849 (stating that the litigant must choose the forum in the first instance, at the start of litigation, for consent to be express).

168. See Stephen I. Vladeck, *Boumediene's Quiet Theory: Access to Courts and the Separation of Powers*, 84 NOTRE DAME L. REV. 2107, 2136 (2009) (explaining that Justice O'Connor's holding in *Schor* provides the ability for a party to waive the right to Article III adjudication in favor of a non-Article III judicial forum).

169. See *Schor*, 478 U.S. at 848 (highlighting that the right to Article III adjudication is dependent on the litigant's waiver of their Article III right).

Therefore, § 636(c) would not constitute a violation of Article III under the *Schor* analysis as the express consent of the parties to waive their right to Article III adjudication is required, and the grant of jurisdiction is specific and narrow to the instance at hand.

The Fifth Circuit should not apply *Stern*, which should be limited to bankruptcy courts, to decide whether the jurisdictional grant of § 636(c) is permissible under Article III of the Constitution.¹⁷⁰ Rather, the Fifth Circuit should apply the analysis of *Schor* and find that § 636(c) is constitutionally permissible as it requires parties to expressly waive the right to Article III adjudication.¹⁷¹ As the right to Article III adjudication is procedural, when a party waives this right, the jurisdiction of the non-Article III forum does not create a separation of powers concern.

IV. POLICY RECOMMENDATION

The Supreme Court's analysis in *Stern* creates friction for Article III jurisprudence going forward.¹⁷² On one hand, it signals a return to a formalist interpretation of Article III, as seen in *Northern Pipeline*.¹⁷³ On the other hand, it seemingly ignores the balancing test for permissible non-Article III adjudication set forth by the Court in *Schor*.¹⁷⁴ While embracing a more literal interpretation of Article III may prevent Congress from overstepping its constitutional prerogatives, this view limits the judicial efficiency and flexibility offered by non-Article III adjudicatory forums.¹⁷⁵ Additionally, by not addressing what "true" consent would look like, *Stern* creates jurisdictional issues for those state law counterclaims that may arise under § 157(b)(2)(C) but otherwise cannot be litigated in the district court, even if referral to the bankruptcy court is withdrawn.¹⁷⁶

When applying *Stern* going forward, courts should limit its application to state law counterclaims that are non-core and that lack express litigant consent to waive the right to Article III adjudication. The holding in *Stern*

170. See *Stern v. Marshall*, 131 S. Ct. 2594, 2620 (2011) (stating that Congress may not encroach on Article III jurisdiction without violating separation of powers).

171. See *Schor*, 478 U.S. at 849 (emphasizing implicit consent to waive the right to Article III adjudication as a factor).

172. See Adam Lewis, et al., *Stern v. Marshall: A Jurisdictional Game Changer?*, PRATT'S J. OF BANKR. L., Sept. 2011, at 6 (espousing the consequences of the decision in *Stern* regarding judicial efficiency).

173. See Pfander, *supra* note 23, at 660-62 (examining the formalist structure behind the decision in *N. Pipeline*).

174. See *id.* at 662-63 (discussing the influence of the holding in *Thomas v. Union Carbide Agricultural Products Co.* on the Court's balancing test as put forth in *Schor*).

175. See *id.* at 656 (stating that a literal interpretation of Article III severely limits the federal court system).

176. See FED. R. CIV. P. 13(a) (stating that if the counterclaim is not brought forth, the option to raise it is forfeit).

should be narrowly applied because it does not call into question the jurisdiction of all non-Article III forums of adjudication.¹⁷⁷ Rather, the holding is central to the idea of a jurisdictional grant foreclosing a litigant's right to Article III adjudication.¹⁷⁸ However, because *Stern* leaves the holding of *Schor* intact, *Stern* does not preclude litigant consent so long as that consent is express.¹⁷⁹

The holding in *Schor* specifically allows parties to waive their right to Article III adjudication, and the emphasis in *Stern* on "true" consent requires litigants to do so expressly.¹⁸⁰ Thus, going forward, when addressing whether the jurisdiction granted to bankruptcy courts is overbroad under Article III, courts should analyze the facts under the holding of *Stern* together along with the litigant consent standard as articulated in *Schor*.¹⁸¹ Additionally, when examining the jurisdictional grant to other non-Article III tribunals, courts should analyze the facts under the holding of *Schor* and not *Stern*.¹⁸² Courts will be able to appropriately gauge whether a violation of Article III has occurred without losing the efficiency of non-Article III adjudication by placing emphasis on whether the litigants have explicitly consented to the non-Article III forum and have waived their right to Article III adjudication.¹⁸³

V. CONCLUSION

Going forward, the Fifth Circuit should analyze 20 U.S.C. § 636(c) under *Schor* and not *Stern*. Ultimately, *Stern* did not overrule the precedent set forth in *Schor* and therefore litigants may still waive their right to Article III adjudication through consent.¹⁸⁴ The holding in *Stern* was intended to affect a small section of state law counterclaims filed in

177. See *Stern v. Marshall*, 131 S. Ct. 2594, 2620 (2011) (stating that the holding of *Stern* is intended to apply narrowly).

178. See *id.* at 2619-20 (underscoring that the litigant had no other choice of forum for the counterclaim adjudication).

179. See *id.* at 2621 (Scalia, J., concurring) (stressing the importance of litigant consent).

180. See *id.* (emphasizing that consent to waive Article III adjudication has to be more than implicit).

181. See *supra* Part III.A.2. (applying *Schor*'s litigant consent standard to *N. Pipeline's* formalist structure).

182. See *supra* Part III.B.2. (analyzing *Schor*'s balancing test with litigant consent standard to the jurisdiction of magistrate judges as applicable under § 636(c)).

183. See *Stern*, 131 S. Ct. at 2625-26 (Breyer, J., dissenting) (explaining that the case law in both *Thomas* and *Schor* require a balanced look at the efficiency of non-Article III adjudication as well as the more formal factors of Article III, such as litigant consent).

184. See *id.* at 2606-07 (majority opinion) (emphasizing the importance of creditor's consent to the bankruptcy court as a forum for his proof of claim, waiving the right for that cause of action to be decided by the district court).

bankruptcy court that are not crucial to the resolution of the bankruptcy estate, and not to bring into question other jurisdictional grants to other non-Article III tribunals.¹⁸⁵ While Congress may not waive the right to Article III adjudication through a jurisdictional grant such as the one given under § 157(b)(2)(C), it is a procedural right that can still be waived by express litigant consent such as the grant under § 636(c).¹⁸⁶ Therefore, going forward, *Stern* should be applied narrowly to only bankruptcy courts. Other grants of jurisdiction to non-Article III tribunals, such as the one within § 636(c), should be analyzed under *Schor*.¹⁸⁷ Following this application of analysis, courts will be able to distinguish between a jurisdictional grant that infringes on the auspices of Article III by limiting the forum available for adjudication, and one where the litigant is able to simply waive the right to Article III adjudication through consent.

185. See *id.* at 2615 (emphasizing the connection to the holding in *N. Pipeline* which was specific to the jurisdiction granted to bankruptcy courts).

186. See *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 848-49 (1986) (proclaiming that as a procedural right, the right to Article III adjudication can be waived by litigants).

187. See *supra* Part IV (explaining that the holding of *Schor* is more applicable to determining separation of powers issues amongst non-bankruptcy non-Article III tribunals).